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Nos. 147 and 269.

Brf. of Post for Appellee & D. C.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Oct. 13, 1902.

ED. H. REID, APPELLANT,

vs.

ROBERT J. JONES, SHERIFF OF ARAPAHOE COUNTY, COLORADO, APPELLEE.

No. 147.
Habeas Corpus.

Appeal from the Circuit Court of the United States for the District of Colorado.

ED. H. REID, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO, DEFENDANTS IN ERROR.

No. 269.
Criminal.

Writ of Error to the Supreme Court of the State of Colorado.

Brief and Argument for Appellee and Defendants in Error.

CHARLES C. POST,
Attorney General of Colorado and
Attorney for Appellee and
Defendants in Error.

IN THE

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Writ of Error to the Supreme Court of the State of Colorado.

May it please the court:

The above entitled causes present two phases of the same controversy, arising as follows:

First—Appellant was convicted in the District Court of Arapahoe county, Colorado, of violating the state inspection law, being section 4288 of Mills' Annotated Statutes of Colorado.

He immediately presented a petition to the District Court of the United States for the District of Colorado, praying a writ of *habeas corpus*, alleging the unconstitutionality of the state law under which he was convicted. On hearing, the writ was refused, and the petitioner remanded. From that decision he appealed to the Supreme Court of the United States, which is the cause numbered on the docket of this court as No. 147.

Second—Appellant also sued out a writ of error in the Supreme Court of Colorado, directed to the District Court of Arapahoe county. On February 3, 1902, the Supreme Court affirmed the judgment of the District Court (*Reid vs. People*, 68 Pac. Rep., p. 228), and thereupon he sued out a writ of error in this court, directed to the Supreme Court of Colorado, which is now numbered on this docket No. 269.

It will be noted that appellant and plaintiff in error has suffered much judicial tribulation in his endeavor to maintain his construction of his constitutional rights.

The facts out of which the controversies arose are: That appellant, about June 20, 1901, brought into Colorado 882 head of cattle from the counties of Lubbock and Cochran, Texas, which are south of the quarantine line, without having held said cattle at some place north of said line for a period of at least ninety days prior to bringing them into Colorado, and without having secured from the state vet-

erinary sanitary board of Colorado a certificate or bill of health such as is contemplated by the statute.

The sections of the Federal Constitution, and the enactment of Congress, and of Colorado, upon the subject are as follows:

"Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *(U. S. Con., Art. 1, Sec. 8, subd. 3.)*

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." *(U. S. Con., Art. 4, Sec. 2.)*

"No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress * * * *" *(U. S. Con., Art. 1, Sec. 10, subd. 2.)*

"An act for the establishment of a bureau of animal industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia, and other contagious diseases, among domestic animals." Approved May 29, 1884. *(Supplement to Revised Statutes U. S., Vol. 1, pp. 435-6, chap. 60, secs., 3, 6 and 9.)*

"It shall be unlawful for any person, association, or corporation, to bring or drive, or cause to be brought or driven, into this state, between the first day of April and the first day of November, any cattle or horses from a state, territory or county south of the 36th degree parallel of north latitude, unless said cattle or horses have been held at some place north of the said parallel of latitude for a period of at least ninety days prior to their importation into

this state, unless the person, association or corporation owning or having charge of such cattle or horses shall procure from the state veterinary sanitary board a certificate or bill of health, to the effect that said cattle or horses are free from all infectious or contagious diseases, and have not been exposed, at any time within ninety days prior thereto, to any of said diseases. The expense of any inspection connected herewith to be paid by the owner or owners of such cattle or horses." (L., '85, page 336, section 2.)

There are but two questions before the court:

First—Are the provisions of the Federal Constitution above recited contravened by the inspection law of Colorado?

Second—Are the provisions of the act establishing the Bureau of Animal Industry contravened by the inspection law of Colorado?

As to the first question, a reading of the Colorado act shows that it in no way infringes the commercial clause, the equal privilege of citizens clause, nor the import duty clause.

As to the second question, we may examine a little farther into the history of both the state and federal enactment, which examination will, as I believe, show that one supplements the other.

The federal enactment establishing the bureau of animal industry was approved May 29, 1884. Section 3 of the act invites the state authorities to co-operate in the execution and enforcement of this act.

Nearly a year later the state of Colorado passed an act "to prevent the introduction of any infectious or contagious diseases among the cattle and horses of this state," which was approved March 21, 1885. (Session Laws of Colorado, 1885, page 335.)

It would seem, therefore, that the Colorado act was intended as supplementary to and along the line of the federal act. This view finds support in the language of this court in reviewing a statute almost identical with that of Colorado:

"While the states were invited to co-operate with the general government in the execution and enforcement of the act, *whatever power they had to protect their domestic cattle against such diseases was left untouched and unimpaired by the act of congress*"

M. K. & T. Ry. Co. vs. Haber, 169 U. S., 613 (623).

In passing, it is well to call the attention of this court to a proviso in the Animal Industry Act that seems to have received no mention in the many cases in which the act was involved.

Section 6 of the Animal Industry Act provides as to transportation of cattle having communicable diseases and then attempts to declare when communicable diseases shall not be considered contagious in these words:

"Provided, That the so-called splenetic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto."

If there is any provision that would seem to eviscerate an act, to deprive it of every possible sort of benefit, it is this provision, which declares that a well-known fact in the natural world does not exist under certain commercial conditions.

This court has already declared the necessity for the act of prevention and, quoting this court in support of its opinion, the Supreme Court of Missouri has stated the fact as follows:

"Since those cases were decided, scientific investigation has demonstrated, and it is now a matter of general information or knowledge, that Texas cattle are not, in fact, diseased themselves, so as to render them unhealthy for food, but that all Texas cattle are infected in their systems with a parasite or germ, which is harmless to them, but which when taken into the stomach by native cattle produces what is known as Texas fever. In *Kimmish vs. Ball*, 129 U. S., 217, it was said: 'That cattle coming from those sections of the country during the spring and summer months are often infected with a contagious and dangerous fever, is a notorious fact.' If then, it be a notorious fact, courts will take judicial notice thereof, and no proof is required. So it is said that: 'Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction.' Greenleaf on Evidence (14 Ed.), Sec. 6. 'If a fact alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which courts will take judicial notice.' *Minnesota vs. Barber*, 136 U. S., 313; *Brown vs. Piper*, 91 U. S., 37-42; *Phillips vs. Detroit*, 111 U. S., 604, 606.

"Whatever difference of opinion may have at one time existed as to the cause and character of what is known as Texas fever, and the manner in which it is communicated to native cattle of the state, yet the fact is of common knowledge that the disease is imparted under certain conditions by Texas cattle. This peculiar characteristic, and its notoriety, is recognized by this and many other states, as is shown by the various legislation with respect thereto as well as by regulations in the markets of the country which re-

quire this class of cattle to be kept separate from others."

Grimes vs. Eddy, 126 Mo., p. 168 (179).

This having been ascertained as a fact, and a fact so well established as to become a matter of general knowledge and so universally admitted to exist that the courts take judicial knowledge of it, it would seem that if congress intended the act as an exclusive regulation of the animal industry, superseding state legislation, that it must fail of its very purpose and put a premium on the shipment of diseased animals to market.

If the cattle are afflicted with the germ of the disease and at various points along the line to market they are unloaded to be fed and watered, it must appear self evident that the germs would be distributed wherever the cattle had come in contact with stock yards, and so aid in spreading the disease it is, at least, the alleged purpose, of the act to prevent. Such a startling exception can only have crept into the statute insidiously, and by the same influence in favor of particular interests that is found almost universally in corporation state acts which usually read "all corporations, except railroad and telegraph, shall be required" and then follows the imposed duties on all corporations, which railroads and telegraph companies seem to escape so successfully.

This exception in the Animal Industry Act should receive the attention of this court, and if such exception nullifies, as it appears, the beneficent provisions of the act, then the state of Colorado is without pro-

tection at all from the Federal act and must rely exclusively upon her statute.

In case of the *M., K. & T. Ry. Co. vs. Haber, supra*, the question of whether or not the regulations prescribed by the Agricultural Department as incidental to carrying the act into effect, could relieve from civil liability, was before the court, and in answer thereto the court says:

"The act does not declare that the regulations established by the Department of Agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law or under some state enactment for damages arising out of the introduction into that state of cattle so affected. As will be seen from the regulations prescribed by the Secretary of Agriculture, that officer did not assume to give protection to any one against such liability."

M., K. & T. Ry. Co. vs. Haber, 169 U. S., 624.

In the case at bar, the Federal inspector did add these words:

"Animals which have been inspected and certified by an inspector of the U. S. Bureau of Animal Industry, *and are free from disease* have the right to go into any state, and may be sold for any purpose, without further inspection or the exaction of fees."

Appellant's Ex. B. Abs., folio 34.

If it was not intended that the regulations of the Secretary of Agriculture could exempt a party from civil liability, it certainly was not intended, that, by a mere ipse dixit, an inspector could exempt a party from criminal liability for the violation of a state

statute. The provision on the inspection certificate is that animals which have been inspected *and are free from disease* may go into any state. As to whether such cattle were, as a matter of fact, free from disease, would depend entirely on their condition when they reached the state line of Colorado and that could only be determined by the state inspection.

As to the injuries resulting from said actions this court says:

"Neither corporations nor individuals are entitled, by force alone of the constitution of the United States and without liability for injuries resulting therefrom to others, to bring into one state from another state, cattle liable to impart or capable of communicating disease to domestic cattle. The contrary can not be affirmed under any sound interpretation of the constitution. This court, while sustaining the power of congress to regulate commerce among the states, has steadily adhered to the principle that the states possess, because they have never surrendered, the power to protect the public health, the public morals, and the public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the national constitution, nor come in conflict with acts of congress passed in pursuance of that instrument. Although the powers of a state must in their exercise give way to a power exerted by congress under the constitution, it has never been adjudged that that instrument, by its own force, gives anyone the right to introduce into a state, against its will, cattle so affected with disease that their presence in the state will be dangerous to domestic cattle."

M., K. & T. Ry. Co. vs. Haber, 169 U. S., p. 628.

Appellant claims that the fee of 1.5 cents per head is unreasonable because, as asserted by appellant's counsel, it goes beyond the necessities of the case.

The question of inspection fees has been before this court in a very recent case. In 1891 the legislature of North Carolina passed an act providing for a charge of 25 cents per ton on all fertilizers for the purpose of defraying the expenses connected with the inspection of the article. The matter came before this court upon the express question of the unreasonableness of the fees, among other things and in respect thereto this court said:

"If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge. But treating the question whether the charge of twenty-five cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared, as a judicial question we are satisfied that comparing the receipts from this charge with the necessary expenses, such as the cost of analyses, the salaries of inspectors, the cost of tags, express charges, miscellaneous expenses of the department in this connection, and so on, we can not conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected as to justify the imputation of bad faith and change the character of the act."

Patapsco Guano Company vs. North Carolina, 171 U. S., 345 (354).

The reasonableness of the fees would be made to depend upon the surrounding facts. It remains to be demonstrated that the fees are larger than are necessary for carrying the law into effect, and in the ab-

sence of such proof the court cannot conclude that the fees are unreasonable. Indeed it appeals to the reason without proof, that in the examination of animals, such as cattle and horses, that the fee of 1½ cents per head would hardly pay wages to the inspector for the time necessarily consumed in making a proper examination of each animal.

On the state branch of the case I cannot better advise the court than to refer to the opinion of the Supreme Court of Colorado in this case, *Reid vs. People*, 68 Pac. Rep., p. 228.

On the federal branch of the case it seems apt and fitting that the opinion of Judge Hallett should be submitted in full, it being as follows:

"This is a petition for a writ of habeas corpus. The petitioner was tried and convicted in the District Court of Arapahoe county for bringing cattle into this state contrary to the provisions of an act of the state to prevent the introduction of any infectious or contagious disease among the cattle and horses of this state. This act was approved March 21, 1885, 5 Sess., 335. In the first section all persons are forbidden to bring cattle or horses into the state which are subject to any infectious or contagious disease. In the second section it is declared to be unlawful for any person to bring or drive cattle or horses into the state from a territory or country south of the thirty-sixth parallel north latitude, unless said cattle or horses have been held at some place north of said parallel of latitude for a period of at least ninety days prior to their importation into this state, or unless the person owning or having charge of such cattle or horses shall procure from the state veterinary sanitary board a certificate or bill of health to the effect that said cattle and horses are free from all infectious and contagious diseases

and have not been exposed at any time within ninety days prior thereto to any of said diseases.

"The petitioner failed to get this certificate and thereupon he was convicted under the terms of the act for violating its provisions and judgment was given against him of imprisonment for a term of six months.

"It is contended on behalf of the petitioner that this act is displaced by an act of congress on the same subject which was approved May 29, 1884. The petitioner shows that he complied with the act of congress by procuring the cattle to be inspected in the state of Texas according to its terms and receiving a certificate that they were free from disease and might be exported from the state under the act of congress. This certificate of inspection, issued by the federal inspector in Texas, is dated June 18, 1901, and the proceedings in the District Court of Arapahoe county are dated June 26, 1901.

"With reference to both the act of congress and the act of the state of Colorado upon this subject it is to be observed that they are inspection laws. The act of congress is directed to the question of exporting cattle from any place where they may be subject to the diseases mentioned in the act, and probably refers especially to the matter of exporting cattle from the United States to a foreign country. But section 6 of the act is directed to the exporting of stock, cattle and horses from one state into another. So that, while the principal purpose of the act was to control the matter of exporting diseased cattle to foreign countries, it does in terms apply to the exporting of cattle from one state and importing them into another. The act of the state of Colorado relates only to the subject of importing cattle into this state. It provides for the appointment of inspectors and requires cattle, which shall be brought into the state from certain parts of the country which are said to be affected with the diseases against which the act is directed, to be inspected at the state line.

"Counsel for the petitioner assumes that the regulations of congress upon this subject, having been adopted in pursuance to the power conferred by the Constitution of the United States upon congress to regulate commerce with foreign countries and between the several states, and, in pursuance to the provisions of the Constitution of the United States, it can not be a subject of state legislation. Counsel contends that the power of congress in regulating commerce between the several states and with foreign countries is exclusive and states have no power in respect to it; this is probably a correct position if it were true that the matter of the act of congress was solely a question of commerce and if the act of congress were to be regarded as only a regulation of commerce. But it is not that—at least, it is not that as to commerce between the states. The power to prevent the spread of contagious and infectious diseases amongst animals and men resides in all governments. It resides in the United States to the extent that such powers are necessary to the functions of the government of the United States. In a much larger degree it resides in the several states, because the states are charged directly with the preservation of the health of the community, and as incidental to that the preservation of food and all articles which are intended for the use of men. So that it may be said, looking upon both of these acts as inspection laws, that they are within the power of the several governments from which they emanate. It may be said also that the state has a larger power than has congress in respect to a matter of the inspection of animals who may be thought to have some disease which renders them unfit for use. And so, when a law is clearly an inspection law, and that only, the act of one government does not at all displace the act of another. This is true as to contagious diseases among men. In the southern parts of the United States there are inspection laws and quarantine laws under the state and

under the federal government as well, both of which must be observed. I myself have been subjected to the operation of these laws in the state of Texas and have been required to comply with both the laws of Texas and the laws of the United States in respect to journeying through the country.

"The Supreme Court has often held in respect to food products and articles intended for the use of men that the inspection laws of the states went beyond limits which might be reasonable in respect to the exercise of the police powers of the state. This was the case in regard to intoxicating liquors in which the famous decision about original package was made, in which the court went so far as to say that under the power of congress to regulate commerce between the states, whisky and other intoxicants might be imported in original packages. There is something of the same kind in respect to oleomargarine and some decisions upon that subject. There is a case in 179 U. S. about cigarettes, a five to four decision, in which the court reaches the conclusion that a package of ten cigarettes is not an original package within the meaning of that term as theretofore expounded by the Supreme Court; and therefore the law of Tennessee, under which the ten cigarette packages imported into the state of Tennessee were condemned, was upheld.

"In the case of cattle and horses, which may be affected with disease, no question arises as to the character of the acts relating to them. There is no such question in the case of cattle and horses as has arisen in respect to whisky and oleomargarine, and cigarettes, and the like, because no one has maintained until now that these were matters upon which the state was not at liberty to legislate. This appears very clearly in the case of Kimmish vs. Ball, 129 U. S., 217, and of M., K. & T. Ry. Company vs. Haber, 169 U. S., 613. Those cases clearly support the doctrine that inspection laws in respect to cattle and horses

which are intended to prevent the spread of contagious diseases among them are valid, whether state or national; that they may stand together; that each government may make its own rule in respect to the matter, and shippers of cattle and horses must comply with the law, both state and national."

Under the guise of interstate commerce no person, or company, should be permitted to traffic in that which is dangerous to the welfare of the state through which such commerce is carried on. December 10, 1900, the Secretary of Agriculture notified all transportation companies and owners of stock that a contagious and infectious disease known as splenetic or Texas fever existed among cattle within the area including Lubbock and Cochran counties from which the cattle came. On May 4, 1901, the state veterinary sanitary board made substantially the same proclamation, adopted the same line of quarantine; on the 6th of May the governor issued his proclamation, and on the 18th of May, 1901, these cattle were shipped while the foregoing regulations were in force.

The Colorado statute prohibits the importation only between certain dates, May 1st and November 1st, in each year, and then only prohibits the importation of diseased cattle. The Colorado statute is purely an inspection law, because it has placed a time limit as to when the act ought to be done, and as to the kind of cattle that ought not to be imported. For healthy stock, the season is open at all times, and it is open to all stock seven months in the year—the winter season, when the germ of the disease would be killed by the weather; and the cars that might be infected thereby, or the yards, would be rendered non-

infectious and non-contagious, because the germs would be neutralized by the severity of the weather.

It was not the intention of the congressional prohibition to destroy the products of interstate commerce of one state to satisfy a mere theoretical interpretation of the law by saying that the state threatened could not protect itself because legislation had thrown a protection around products in transit and denied the same to products in the field.

Under the federal act, if a carload of cattle is presented to the federal inspector he may inspect and detain them if found diseased, because such cattle are being transported against the provisions of the act, unless, indeed, the shipper is wise enough to claim that the cattle are being transported by rail to market for slaughter, when these diseased cattle, leaving a trail of pestilence wherever they pass, must be considered as not having any contagious or infectious disease, under the exception in section 6.

And yet, if this is exclusive legislation, then, indeed, the state is helpless to protect itself against ravages of stock diseases, and its citizens must suffer that diseased cattle and horses labeled with the magic of interstate commerce may pass on without interference.

On the other hand, I affirm with the positiveness of conviction that the federal act is not only not exclusive, but is merely directory. That it was enacted in obedience to a widespread demand for protection against a disease so serious in its consequences that it had become a matter of judicial recognition, and that, in obedience to this federal recognition, the states followed with enactments, varied to suit the

circumstances of their own local position, which of necessity become an essential part of the law, for the regulation that might protect one state might be of no avail to another differently situated.

As to the numerical part of the argument, on page 25 of appellant's brief, that passing through eight states eight inspections might be demanded, I will concede for the purposes of the argument that this might happen, and I go farther and say that it ought to occur if it is necessary to protect the state against the importation of diseased cattle. The inspection should only be limited by the range of the disease, and not by state lines. The purport of the inspection is to ascertain a fact, and not to satisfy a theory. If in seven states no disease is found, and in the eighth state it has developed, then the inspection has served its purpose—it has arrested the disease at the point where it is most harmful. The traffic in diseased cattle is illegitimate, and no amount of detention, nor any considerable number of inspections, with a fee for each, can be considered a burden under such circumstances.

This court does not deal with the refinement of suppositions. It aims to deal with facts as they occur in the various parts of the Union.

It must of necessity recognize that local conditions are the very essence of preservation. Regulations that in Maine would be absurd become of substance and importance in western states. It is with these facts that we have to deal. The stamping out of disease is the most important work of the present age. Fever germs that are virulent on low coasts are neutralized on the high tablelands of the interior.

Diseases that do not affect, so far as it has been demonstrated, certain parts of the south, are fatal to cattle north of those sections.

As the question is one of materiality and substance to the state of Colorado, I have presumed at some length to set forth not only the leading cases upon the subject, but to invite the attention of this court to an existence of facts, upon which these decisions were framed, and which, in my view, should be controlling of this matter.

I believe that the Colorado Inspection Act, which has been upheld by the State Supreme Court and by the federal court, is a wise provision, called forth in aid of the federal act, and, as such, should be sustained.

Respectfully submitted,

CHARLES C. POST,
Attorney General of Colorado.

Supreme Court of the United States.

No. 147—October Term, 1902.

Ed H. Reid, Appellant,
vs.
Robert J. Jones, Sheriff of the County of Arapahoe, State of Colorado.

Appeal from the Circuit Court of the United States for the District of Colorado.

[December 1st 1902.]

Mr. Justice Harlan delivered the opinion of the Court.

After the appellant Reid had been convicted and sentenced, as shown in the case just decided, he was arrested upon a mittimus sued out by the State. He immediately obtained a writ of *habeas corpus* from the Circuit Court of the United States for the District of Colorado. But that court, upon hearing, remanded the prisoner to the custody of the State authorities, and dismissed his application to be discharged. He thereupon prayed and was allowed an appeal to this court.

The merits of this case have been fully considered in case No. 269. But if this had not been, we should dismiss the present appeal: for, one convicted in a State court for an alleged violation of the criminal statutes of the State, and who contends that he is held in violation of the Constitution of the United States, must ordinarily first take his case to the highest court of the State, in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error: that only in certain exceptional cases, of which the present is not one, will a Circuit Court of the United States, or this court upon appeal from a Circuit Court, intervene by writ of *habeas corpus* in advance of the final action by the highest court of the State. *Ex parte Royall*, 117 *U. S.* 241, 251; *New York* v. *Eno*, 155 *U. S.* 89; *Minnesota* v. *Brundage*, 180 *U. S.* 499, 502, *and authorities cited.*

The judgment is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.